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Supreme Court of the United States

October Term—1939

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF PETITIONERS

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Opinions Below.

No opinion was rendered by the United States District Court for the Southern District of New York, before which Court the case was tried.

The opinion of the Circuit Court of Appeals for the Second Circuit appears in the record at pages 116-125. It is reported at 103 F. (2d) 348.

Jurisdiction.

Certiorari to review the judgment of the Circuit Court of Appeals entered on April 13, 1939 (R. 126) was granted by this Court on June 5, 1939 (R. 126), upon a petition therefor based upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229 Sec. 1; 43 Stat. 938; 28 U. S. C. A., Sec. 347(a).

The Questions Presented.

The judgment appealed from affirms the conviction of the petitioners in the District Court of the United States for the Southern District of New York under an indictment of the petitioners, among others, for use of the mails to defraud, in violation of Title 18, U. S. C. Section 338 [U. S. C. C. Section 215]; and for conspiracy to use the mails to defraud, in violation of Title 18, U. S. C., Section 88 [U. S. C. C. Section 37].

In granting the petition for a writ of certiorari, this Court limited review to the question whether the trial court properly received in evidence intercepted telephone communications. Under this limitation, the questions presented are as follows:

(1) Should the evidence of intercepted intrastate telephone communications have been excluded by virtue of the wire-tapping provisions of Section 605 of the Federal Communications Act of 1934?

(2) Should the evidence of intercepted intrastate telephone communications have been excluded by virtue of the Fourth and Fifth Amendments to the Constitution of the United States?

(3) Should the evidence of intercepted intrastate telephone communications have been excluded by virtue of Section 1423, Subdivision 6, of the Penal Law of the State of New York?

Statement of the Case.

The alleged scheme charged against the petitioners in the indictment under which they have been convicted was a scheme to defraud insurance companies by inducing them to pay false claims for disability, health and accident benefits. Defendants Nelson, Berger and Spitz (who pleaded guilty and testified for the Government) were holders of insurance policies who presented to insurance companies fraudulent claims of disability resulting from heart disease. Defendant Messman, a physician (who also testified for the Government), assisted the claimants by furnishing them with false medical certificates and by instructing them in the method of simulating illness. Petitioner Weiss, a lawyer, and petitioner Gross, an insurance agent, were alleged to have contributed their professional talents to the furtherance of the claims, with knowledge of their falsity. Petitioner Goldstein, a physician, was charged with furnishing a false certificate in aid of the Nelson claim, and petitioner Krupp, also a physician, with having furnished such a certificate in aid of the Spitz claim. The conspiracy and scheme thus charged in the indictment covered a period from January 15, 1934 to the date of the filing of the indictment on July 30, 1937. Nineteen counts charged use of the mails to defraud and the twentieth count charged conspiracy.

Petitioners Weiss, Goldstein and Gross were convicted on all counts except those numbered 8 and 12, and petitioner Krupp on all except those numbered 8 to 13 inclusive.

A vital part of the Government's case, received over petitioners' objections and exceptions, was derived from telephone communications, intercepted by tapping telephone wires. Three categories of evidence are involved in this connection:

(1) Evidence of seventy-six intercepted intrastate telephone communications was directly introduced and admitted (R. 129);

(2) The contents of three intercepted intrastate telephone communications, while not directly placed in evidence, were put before the jury in the form of questions of the prosecutor (R. below 2000, 2003, 1963-9, 1908-25)[1];

(3) Evidence of one intercepted telephone communication was directly introduced and admitted despite the absence of any proof as to whether the communication was intrastate or interstate (Ex. 307, R. below 1334; 2114).

The telephone wires thus tapped were those of the office of the petitioner Weiss, located in the City of New York (R. 64), and of the defendant Messman, also located in the City of New York (R. 64). Every call from or to the Weiss office was intercepted and recorded (R. 82) regardless of whether the call was interstate or intrastate (R. 83). It is conceded that interstate calls were made from the Weiss office (R. 129) and the tapped wires were thus conduits of both interstate and intrastate communication.

The taps were placed on the telephone wires by a New York City policeman, McGlynn (R. 64), acting under the instructions of an United States Postal Inspector, Shea (R. 64). The work of intercepting and recording the communications was carried out by employees of Harley Detective Agency, a private detective agency, acting under the direct control and supervision of agents of the United States (R. 67). The intercepted communications were recorded directly upon a

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[1] The record in this Court has been greatly condensed by stipulation, upon the agreement that either party may refer to any portion of the complete transcript of record filed in this Court on petition for writ of certiorari (R. 130). The complete transcript of record will be cited herein as "Record below".

phonographic disc and stenographic transcripts of the conversations were also made. The cost of the work was defrayed by insurance companies (R. 91) and stenographers employed by insurance companies or their attorneys assisted in transcribing and recording the intercepted messages (R. 90). Each night the records and stenographic transcripts of the communications intercepted during the day were delivered to the United States Attorney or his representatives (R. 74). These activities were carried on for a period of months prior to the finding of the indictment (R. 75).

The wire-tapping constituted a criminal offense under the laws of the State of New York (New York Penal Law §1423, subd 6).

After the arrest of the defendants upon the return of the indictment, the defendants Messman, Nelson, Berger and Spitz were confronted with records of conversations in which they had participated. These defendants thereupon decided to turn state's evidence and to assist the Government. It is fair to say that this decision on their part was prompted by special consideration on the part of the Government and by hopes, if not promises, of leniency. Throughout the long period between his arrest and the date of trial, Messman received a salary from the Government, originally in the amount of $65 per week and later raised to $100 per week. The total compensation thus paid him up to the date of trial was $3,227.12 (R. below 814). Nelson received a salary of $50 per week or a total of $1,755 (R. below 365-366). Berger received $50 per week from a person which he did not identify (R. below 1570). Spitz received from an insurance company the sum of $1,700 for the surrender of a policy, the cash value of which was only $878.40 (R. below 1237). At the conclusion of the trial, Nelson, Berger and Spitz received suspended sentences (R. 30). Messman was not sentenced and his license to practice medicine was not revoked (R. below 863-4).

Messman, Nelson, Berger and Spitz assisted the United States Attorney in the preparation of the case for trial, particularly with respect to the evidence of intercepted telephone communications. They listened to the records of their conversations as they were played to them in the United States Attorney's Office, compared the phonographic record with a typewritten transcript of the conversation and corrected the transcript when necessary (R. 35). They identified both the record and transcript by initialing them (R. 35).

At the trial a phonograph was set up in the courtroom directly opposite the jury. It was operated by an employee of the Harley Detective Agency (R. 62-3). The witnesses (Messman, Nelson, Berger and Spitz) were then shown the records and stenographic transcripts of the conversations which they identified by virtue of the initials which they had previously placed upon them (R. 35). Both the records and stenographic transcripts were then received in evidence over defendants' objection and exception (R. 33-34); copies of the transcript were handed to the jury and the records were played upon the phonograph, with considerable dramatic effect.

It is deemed unnecessary to analyze the evidence obtained through wire-tapping inasmuch as its prejudicial nature has been asserted by the Court below and virtually conceded by the Government. Thus, the Court below said (R. 119-120):

> "Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received."

Further (R. 120):

> "The defendant Weiss is in the same position and his conviction can only stand if we are right in holding

> that the communications derived through wire tapping were competent evidence. Weiss, who was a party to conversations obtained through thirty-four wire taps was prejudiced by their admission unless they were lawfully received in evidence."

The Court also held specifically that the petitioners Gross and Krupp were prejudiced if the intercepted communications were improperly admitted (R. 120).

The evidence in question, according to the statement of the United States Attorney, in his summation, constituted the "crux" of the prosecution's case (R. below 2575). And in its brief opposing certiorari, the Government said (Br. p. 2):

> "The Circuit Court of Appeals was of the opinion that if the intercepted messages were improperly admitted, each of the petitioners was prejudiced, and the Government does not dispute that this is so if all of them were inadmissible."

Specification of Errors To Be Urged.

Under the limitation imposed by this Court in granting certiorari, the only specified errors open to review are the errors which petitioners insist were committed by the trial court in admitting evidence of intercepted intrastate telephone communications in violation of

> (1) Section 605 of the Federal Communications Act of 1934, (2) the Fourth and Fifth amendments to the Constitution of the United States, and (3) Section 1423, Subdivision 6, of the Penal Law of the State of New York.

Statutes Involved.

First: Section 605 of the Federal Communications Act of 1934 (Ch. 652, 48 Stat. 1064, 1103; Title 47, U. S. C., Section 605):

"605. Unauthorized publication or use of communications.—No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, sub-

stance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, §605, 48 Stat. 1103.)"

Second: The Fourth and Fifth Amendments to the Constitution of the United States:

"ARTICLE FOUR

Security from Unwarrantable Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE FIVE

Rights of Accused in Criminal Proceedings

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Third: Section 1423, Subdivision 6 of the Penal Law of the State of New York:

"A person who wilfully or maliciously displaces, removes, injures, or destroys: * * *

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a

room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned;

* * * * * *

* * * is punishable by imprisonment for not more than two years."

Summary of Argument.

POINT I.

The evidence derived from intercepted telephone communications was inadmissible because it was obtained and divulged in violation of Section 605 of the Federal Communications Act.

A. Wire-tapping provisions of Section 605 apply to intrastate as well as interstate communications.

1. The language of the statute shows that it applies to intrastate communications.

2. The purpose of the statute, as revealed by the evils which it was designed to remedy, shows that it applies to intrastate communications.

B. The interception and divulgence of the communications were not "authorized by the sender", within the meaning of Section 605.

POINT II.

The evidence derived from intercepted telephone communications was inadmissible because obtained and received in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

POINT III.

The evidence derived from intercepted telephone communications was inadmissible because obtained in violation of State Statute.

POINT I.

The evidence derived from intercepted telephone communications was inadmissible because it was obtained and divulged in violation of Section 605 of the Federal Communications Act.

It is now settled that Section 605 prohibits wire-tapping by Federal officers as well as by private persons, and that the "divulgence" of intercepted communications, which is prohibited by the statute, includes testimony to such communications in Court.

Nardone v. *United States*, 302 U. S. 379 (1937).

Two questions remain: (a) Whether Section 605 applies to intrastate as well as to interstate and foreign communications. (b) If so, whether in this case the interception and divulgence of the communications were "authorized by the sender", within the meaning of Section 605.

The first question was discussed at length by the Court below. The second was not mentioned in the Court's opinion although the point was argued before that Court by the Government and has again been urged in the Government's brief in opposition to petitioners' application for certiorari. Each of these questions will be considered in this brief.

A. Wire-tapping provisions of Section 605 apply to intrastate as well as interstate communications.

The pertinent portion of the Section (quoted in full *supra* p. 8) provides that:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received

such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof * * *."

The Court below based its affirmance of the conviction upon the proposition that these provisions do not apply to intrastate communications. In so construing the Section, the Court below followed the decision of the First Circuit in *Valli* v. *United States*, 94 F. (2d) 687 (1938)[1] and expressly rejected the contrary decisions of the Sixth and Third Circuits respectively, in *Diamond* v. *United States*, 94 F. (2d) 1012 (1938)[2] and *Sablowsky* v. *United States*, 101 F. (2d) 183 (1938). The Court stated that in view of this conflict of decisions, it reached its result "with some hesitation" (R. 119).

Petitioners contend that the construction placed upon the statute by the Court below was erroneous and that this conclusion follows from a consideration of (1) the words of the statute itself and (2) the underlying purpose of the statute as revealed by the examination of the evils which it was designed to remedy.

1. The language of the statute shows that it applies to intrastate communications.

(a) It will be observed that the Section contains four principal clauses or subdivisions, separated by semicolons. The

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[1] This Court granted certiorari (*Valli* v. *United States*, 58 Sup. Ct. 760) but thereafter further proceedings were abandoned by the petitioners and the case was never argued in this Court.

[2] The question was discussed most thoroughly in an unreported opinion of the Court in the *Diamond* case denying the Government's motion for a reargument. This opinion is included in an appendix to the brief heretofore filed by petitioners in support of the petition for certiorari.

first and third subdivisions prohibit the unauthorized divulging or use of any "interstate or foreign communication" by persons *receiving* or *transmitting* the same. The second and fourth subdivisions deal with the *interception* of messages; they prohibit the interception of "*any* communication"; they prohibit the divulging of such intercepted communication to any person, and they prohibit the use of information derived from "such intercepted communication".

Literally construed, therefore, the interception provisions of Section 605, which are the provisions here involved, apply to all communications, intrastate as well as interstate and foreign. The natural meaning of "any" includes "all". This Court has heretofore given effect to such a meaning in the construction of statutes. Thus, in *Nigro* v. *United States*, 276 U. S. 332 (1928), in which this Court construed Section 2 of the Anti-Narcotic Act [38 Stat. 785; 40 Stat. 1057, 1130], it was held that the phrase "any person" included all persons, and that it was not to be limited to a particular class of persons mentioned in a prior section of the statute.

The burden is thus fairly cast upon those who seek to establish an interpretation other than that required by the fair meaning of the words used.

(b) The primary argument advanced against this construction is that the context of other provisions of the Communications Act "seems to limit the application of §605 to interstate and foreign messages" (opinion below R. 117). Thus, the Court below noted that the first Section of the Act (47 U S. C. Section 151) declares that the Communications Commission was created for the purpose "of regulating interstate and foreign commerce in communication by wire and radio", and the next Section of the Act (47 U. S. C. Section 152) provides that:

> "(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio * * *

> (b) Subject to the provisions of section 301, nothing in this act [chapter] shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, * * *."

It would seem clear that the carefully drawn delimitation provisions of Subsection (b) in no wise limit the scope of the interception or wire-tapping provisions of Section 605. Those provisions prohibit interception and the divulging of intercepted communications; they do not concern the Commission or its "jurisdiction" or regulatory powers.

Eliminating Subsection (b), the argument against a literal construction of Section 605 is that the basic object of the Act, as expressed in Section 1 and Section 2 (a), is to protect and regulate interstate and foreign communications, and hence that it is not to be supposed that Congress intended to prohibit the interception or divulging of intrastate communications.

We think the argument is neither persuasive nor sound. One answer to it may be found in the opinion of the Third Circuit in *Sablowsky* v. *United States, supra*, namely, that the wire-tapping provisions of Section 605 are not regulatory provisions, and hence that the purpose behind the regulatory portions of the Act has no bearing upon the construction of Section 605. As the Court there said (p. 189):

> "It will be noted that the provisions of Section 605 are very different in their nature from those of the other sections of the Communications Act which in fact relate to the regulation of common carriers by wire and radio. * * * Upon the other hand the provisions of the second and fourth clauses of Section 605, which upon their face purport to relate to all per-

sons, do not relate to the regulation of communication carriers and therefore constitute a rule of evidence in the purest sense."

Moreover, wholly apart from such considerations, there is a second answer which we feel to be conclusive. It is a matter of common knowledge, of which this Court may take judicial notice, that the wires of modern telephone systems are designed to carry and do carry both interstate and intrastate communications and, indeed, that both kinds of messages may be and frequently are carried over the same wire simultaneously. In fact, the wires here involved concededly served both interstate and intrastate purposes (R. 129). Granting that the primary purpose of the statute is to protect interstate and foreign communications, it is obvious that such communications cannot be practically or effectively protected without protecting the wires which carry them, and an adequate protection of the wires obviously requires the complete prohibition of all interception and of the divulgence or use of all intercepted communications, whatever their nature or origin. As the Circuit Court of Appeals said in the *Diamond* case, *supra*[1]:

> "If a federal agent is permitted to listen in on a telephone conversation he of course hears all that is said regardless of whether the communication is interstate or intrastate in its nature. He is given an opportunity to hear and disclose that which he is forbidden to hear and disclose and to that extent the privacy which the Communications Act manifestly intends to secure for both interstate and foreign communications by telephone is destroyed."

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[1] See appendix to petitioners' brief on application for certiorari, page 30.

The Court below attempted to answer this argument by suggesting in its opinion that a prohibition against the *divulgence* of intrastate messages (as distinct from their interception) would not tend to protect the privacy of interstate communications (R. 118). Such a statement seems to us to ignore the realities of the situation. This Court has long recognized the principle that a prohibition against the doing of an illegal act can be made effective only by also prohibiting the subsequent use of the fruits of that act. This principle is, of course, the basis of the settled rule that evidence obtained in violation of the Fourth and Fifth Amendments may not be admitted in the Federal courts. *Weeks* v. *United States*, 232 U. S. 383 (1914).

Upon this subject this Court in *Olmstead* v. *United States*, 277 U. S. 438 (1928) said, in discussing the rule of the *Weeks* case and similar cases (p. 463):

> "But in the *Weeks* case, and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received."

This language is equally applicable here. It is clear that the protection of the statute here in question would be much impaired unless it was held that not only was the official violator of the statute subject to prosecution, but also that the evidence thereby obtained could not be received. The privacy of interstate communications by wire and radio can be assured only by forbidding not only the interception but also the subsequent divulgence of all communications passing over those wires.

(c) It has also been argued that Section 605 itself, construed independently of the other provisions of the statute, discloses a purpose on the part of Congress to limit its provisions only to interstate and foreign communications. This was the view of the First Circuit in *Valli* v. *United States*, *supra*, which based this interpretation upon the fact that the first clause and third clauses of Section 605, which apply to persons engaged in receiving or transmitting communications by wire or radio, are expressly limited to interstate and foreign communications. The argument necessarily ascribes to inadvertence the difference in language of the second and fourth clauses of the Section, those which apply to interception, where no such limitation appears.

It may be noted at the outset that such an explanation of the difference in language is made more difficult when it is borne in mind that Section 605 of the Communications Act of 1934 was patterned very closely upon Section 27 of the Radio Act of 1927 (44 Stat. 1172; 47 U. S. C. 3107). There is, however, this significant difference in the two statutes. In the Radio Act of 1927 the words "interstate or foreign" did not appear in any of the four clauses of the Section, which referred only to "radio communications". When the Section was lifted almost bodily into the Communications Act of 1934, however, the words "interstate or foreign" were inserted in clauses 1 and 3 of the Section, but not in clauses 2 and 4. It would appear therefore that the difference in language was due to conscious design on the part of Congress and not merely to careless draftsmanship.

This conclusion is greatly strengthened when it is noted that there is a valid basis for such a distinction and a sound reason for limiting the application of clauses 1 and 3 to interstate and foreign communications and at the same time extending clauses 2 and 4 to all communications, including intrastate. Moreover, this reason is founded upon the prem-

ise that the fundamental purpose of the Section is to protect interstate and foreign communications and prevent their interception or divulgence. Granting this fundamental purpose, it will be seen that the problem confronting Congress in dealing with persons receiving or transmitting communications was different from that presented by persons intercepting them. In the former case, it was sufficient to forbid the divulgence or unauthorized use of interstate and foreign communications alone since, in the case of a receiver or transmitter, the nature of the particular communication would readily be susceptible of proof. In the case of the intercepter, however, it would be in most instances impossible to determine whether the particular communication intercepted was interstate or intrastate, and thus a provision against interception and divulgence of interstate communications only would be rendered incapable of practical enforcement. In the case of the intercepter, therefore, it was necessary to prohibit the interception and divulgence of all communications in order to be sure of protecting the privacy of interstate messages.

Moreover, difficulty of enforcement is not the only reason for the difference in the scope of the prohibition in the respective cases. Another reason is apparent when we consider the difference in the capacities of the persons against whom the prohibition is directed. Persons engaged in the business of receiving and transmitting communications by wire and radio are, of course, necessary to that business. It is impossible to prevent them from learning the contents of the messages which they transmit or receive. The most that Congress could do therefore was to prohibit the unauthorized divulgence of such messages. Bearing in mind the fundamental purpose to protect interstate communications, it was sufficient for Congress to prohibit the divulgence of such communications alone. Intercepters, however, are in a different category. They have no excuse for knowing

the contents of any message. In their case Congress could go farther and provide that they should have no contact whatever with the wires and should not intercept any communication regardless of its nature. Such a provision, undeniably more efficient to accomplish the fundamental purpose of the statute, was possible in the case of intercepters, whereas it was not possible in the case of receivers and transmitters who could not be denied access to the wires.

(d) If it be said that the literal construction (embracing intrastate as well as interstate communications) cannot be regarded as expressing the intent of Congress inasmuch as the regulatory power of Congress is confined to interstate commerce, the simple answer is that Congress has the power, repeatedly recognized and thoroughly established, to impose legislation affecting intrastate commerce whenever that is reasonably necessary as a means of exercising an effective control of interstate and foreign commerce. *Southern Ry. Co.* v. *United States*, 222 U. S. 20 (1911); *Minnesota Rate Cases*, 230 U. S. 352 (1913); *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (1938); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). As the Circuit Court of Appeals said in the *Diamond* case[1]:

> "It seems to us that the privacy to be achieved by the mandate of the statute is the privacy of a conduit or instrumentality of interstate communication, though the same physical equipment may likewise be the means by which intrastate communications are made. The broad scope and constitutional validity of statutes have been sustained where instru-

[1] See appendix to petitioners' brief on application for certiorari, page 29.

mentalities serve both interstate and foreign commerce, even when applied in specific instances to transactions which are not interstate commerce. So the Federal Safety Appliance Act as an exercise of Federal power under the commerce clause has been held to extend to all vehicles used upon a highway of interstate commerce whether the vehicles themselves are so engaged or not, for the safety to be secured by the Act is the safety of the persons transported in interstate commerce, no matter what may be the source of the dangers which threaten it. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 25, 26; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41."

(e) Even if it could be said (as we think it cannot for the reasons just given) that the wire-tapping provisions of Section 605 exceeded the power of Congress in so far as they purport to prohibit the interception of intrastate communications, it is clear that those provisions are valid in so far as they embody a rule of evidence applicable in the Federal courts. In part, at least, the wire-tapping provisions of Section 605 embody such a rule of evidence by excluding the divulging in court of any intercepted communications or of any information thereby derived. *Nardone* v. *United States*, *supra*, 302 U. S. 379.

While, therefore, the wire-tapping provisions may be supported in accordance with their full literal construction, the petitioners are here obliged to support them only to the limited extent of upholding them as a rule of evidence in the Federal courts. The "separability" Section in the Act (Section 608) would afford the basis for upholding a partial validity of the wire-tapping provisions if that were necessary. The Section reads:

"If any provision of this act [chapter] or the application thereof to any person or circumstance is held

invalid, the remainder of the Act [chapter] and the application of such provision to other persons or circumstances shall not be affected thereby. (June 19, 1934, c. 652, §608, 48 Stat. 1105.)"

2. The purpose of the statute, as revealed by the evils which it was designed to remedy, shows that it applies to intrastate communications.

It is a fundamental rule of statutory construction that in determining the meaning of a statute, the particular evil which the act was designed to remedy is to be considered. As was said by Chancellor Kent (1 Kent's Com. Sec. 462), the intent with which statutes are enacted

> "is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the objects and the remedy in view".

It seems to us to be clear that the "mischief" which resulted in the enactment of Section 605 was the oppressive and destructive practice of wire-tapping, and that the "remedy" which Congress had in view was the abolition of this practice.

The pernicious nature of wire-tapping has been recognized by this Court. In *Nardone* v. *United States, supra*, this Court said (p. 384):

> "For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others."

Further, in answer to the Government's contention that Congress did not intend to impede the activities of the Government in the detection of crime, the Court said (p. 383):

> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt §605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution."

Although in the *Nardone* case interstate communications were involved, it is clear that in the passages quoted above this Court was concerned with the practice as a whole and with the interception of all communications regardless of their origin[1].

The practice was characterized by Mr. Justice Holmes, dissenting, in *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) as "dirty business". In that case also Mr. Justice Brandeis, dissenting, spoke of the practice as follows (p. 476):

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[1] The exact question before the Court in the *Nardone* case was stated as follows (p. 380):

> "The importance of the question involved,—whether, in view of the provisions of §605 of the Communications Act of (June 19) 1934, evidence procured by a federal officer's tapping telephone wires and intercepting messages is admissible in a criminal trial in a United States District Court,—moved us to grant the writ of certiorari".

The terms of the problem "as thus stated are broad enough to include the questions now presented". (*United States* v. *Pisco*, 22 Fed. Supp. 242, 243 (D. C. 1938) (holding that Section 605 applies to intrastate communications).)

> "The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. * * * As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping".

And further (p. 480):

> "To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf".

Condemnation of wire-tapping as "dirty business" and as an instrument of tyranny and oppression has not been confined to the opinions of the courts. Governor Lehman of New York has declared it to be:

> "One of the most vicious weapons that dictatorship invokes against individual rights * * *. It has been the vehicle of great oppression and persecution. It has caused people to be afraid of discussing their most intimate personal problems. * * * I am particularly concerned with the danger of wire-tapping. Today no one is safe from the menace of it".

The case at bar presents a striking illustration of the evils of wire-tapping, a significant demonstration of how wire-tapping may become the basis for perjury. Exhibit 209 is a wire-tap of a telephone conversation between defendants Berger and Messman, who testified for the Government (R. below 776). The conversation was held on February 19, 1937 and its substance was that the parties would meet at the office of petitioner Weiss in New York City on the following day, February 20th (R. below 776).

Both Messman and Berger testified that the meeting with petitioner Weiss was held on February 20th as arranged, and they testified at length to a particularly incriminating conversation which they claimed to have had with him on that day. In substance, they testified that on that occasion Messman and Berger executed a certain proof of claim (Ex. 210) in support of Berger's fraudulent claim for disability benefits. They testified that Weiss instructed Berger to use a different pen from that used by Messman (R. below 777) and that Weiss instructed Messman to date his portion of the document February 20th and instructed Berger to date his portion "two days ahead", i.e., February 22nd, lest the use of the same date look "funny and suspicious" (R. below 777). It was testified that the fact that "February 22nd was Washington's Birthday" was overlooked by all (R. below 777).

It was demonstrated at the trial that the testimony with respect to this incident was a complete fabrication. The Government finally conceded (R. below 1864), in the face of overwhelming documentary proof, that the petitioner Weiss was in Pinehurst, North Carolina on February 20th.

The significance of the incident for present purposes lies in the fact that the wire-tap enabled the witnesses to lend plausibility in the first instance to testimony which, as it turned out, was demonstrably false. Taking as a basis the wire-tap which showed that a meeting was actually planned for February 20th, they proceeded to invent a detailed story of a meeting on that day which, in fact, never occurred. But for the fact that by good fortune petitioner Weiss was able to prove an alibi, it is obvious that the credibility of the witnesses' false testimony would have been greatly enhanced by the wire-tap about which such testimony was woven.

Such are the evils of wire-tapping. It seems to us to be manifest that the purpose of Congress in passing Section

605 was to eradicate such evils and to eliminate a practice so destructive of personal liberty. As was said in *Sablowsky* v. *United States, supra* (p. 190):

> "Congress intended the provisions of Section 605 as remedial, and it is well established that statutes which are intended to be remedial in their nature are to be liberally construed".

And in *United States* v. *Plisco, supra,* the Court, referring to the opinion of this Court in *Nardone* v. *United States, supra,* stated (p. 244):

> "The Court treats the provision of Section 605 as remedial, the purpose being to eliminate a practice considered by many to involve 'a grave wrong'".

If we accept this analysis of the purpose of Congress, it is at once apparent that there is no sound basis for a distinction between intrastate and interstate communications. The ethical considerations which support the policy of preventing wire-tapping apply with as much force to one as to the other. It would indeed be illogical to claim that Congress had determined to attack the evil piecemeal, that it had intended to prohibit the interception and divulgence of a telephone message sent from New York City to Jersey City, and at the same time had intended to permit the interception and divulgence of a message sent from New York to Brooklyn. It is "not to be assumed that Congress intended divers and hostile rules for like situations" (*United States* v. *Plisco, supra,* at p. 244).

Judged in the light of its remedial purpose, a construction of the language of Section 605, which includes within its scope intrastate as well as interstate communications is, as the Court said in *Sablowsky* v. *United States, supra,* only "common sense". For, as the Court pointed out (p. 191):

"The ethical problem with which Congress was engaged and which it apparently sought to solve by enacting Section 605 is identical whether the communications intercepted and offered in evidence be interstate or intrastate in character. Nor would an interpretation of Section 605 commend itself to reason whereby certain intercepted communications could be received in evidence while others procured through the medium of an identical tapped line would be inadmissible".

It is submitted that this Court should resolve the conflict which has arisen among the various Circuit Courts of Appeals in construing the wire-tapping provisions of Section 605 by adopting the construction which gives effect to its language and which accords with the underlying purpose of the statute.

B. The interception and divulgence of the communications were not "authorised by the sender", within the meaning of Section 605.

The Government concedes that "This case would clearly be an appropriate one for review by this Court, except for a significant distinction between the instant case and the other pertinent decisions" (Br. opp'g. cert. p. 3). The asserted distinction is stated as follows (Id. pp. 4-7):

"In the prior cases involving the question, the contents of intercepted communications had been testified to by the Government agents who had intercepted them. In the instant case, however, none of the communications was divulged in court by the per-

> sons who intercepted them.* * * Each of these communications was admitted after it had been identified by at least one of the parties thereto. The parties identifying the communications were defendants who had pleaded guilty to the indictment. There is nothing in the instant record to indicate that the testimony of these witnesses was coerced or induced by promises of leniency. * * * Section 605 does not forbid the authorized publication of intercepted communications. * * * It would therefore seem that the word 'sender' as used in Section 605 should be so construed as to permit the divulging of a telephone conversation where either party thereto has sanctioned such divulging."

The Government made the same argument before the court below, but that court apparently deemed it too flimsy to merit attention. A brief consideration will disclose the insubstantial nature of the argument.

The communications in question were first intercepted under the supervision and control of Government agents (R. 64, 67). This interception was forbidden by Section 605. The Government does not pretend that this interception was sanctioned by any party to the communications.

Stenographers in the employ of the insurance companies listened to the intercepted communications. They took stenographic notes. Prior to the trial, as clearly appears from the case on appeal, records of the intercepted communications were played to the Government agents and to the United States attorneys. The records were stenographically transcribed and the transcripts were divulged to the Assistant United States attorneys. Thus, before there was any divulging in court, there was not only a prohibited interception but also a prohibited divulging to various persons. A divulging "to any person", in court or out of court,

is a prohibited divulging under Section 605, and "any person" means all persons as this court held in the *Nardone* case (*supra*, 302 U. S. 379). Were it not for this prohibited and unsanctioned interception and were it not for this prohibited and unsanctioned divulging of communications to the Federal agents by those who did the direct intercepting, the Government would not have had the proof in question.

Having obtained this material by violating the statute, the Government representatives proceeded to confront selected participants with the records of communications in which they had taken part. Under the manifest pressure of such a confrontation, the defendants Nelson, Berger, Spitz and Messman apparently decided to turn State's evidence. It was under these circumstances that these defendants, in advance of the trial, first "identified" the communications (Br. opp'g. cert. pp. 4-5) and apparently agreed to testify for the Government. The conclusion is inescapable that their agreement to testify and their testimony for the Government, if not induced by promises of leniency, were induced by hopes and expectations of leniency. Their expectations were realized. Messman's license to practice medicine was not revoked by any proceedings of the Government, and he continued to practice medicine with the knowledge of the United States Attorney (R. below 864). He was not required by the Government to plead to the indictment (R. below 596). He was paid by the Government (R. below 814). He has not been sentenced. Nelson was also paid a weekly stipend by the Government (R. below 365-6). His sentence was suspended; Berger's sentence was suspended; Spitz' sentence was suspended (R. 30).

The fact that Nelson, Berger, Spitz and Messman under these circumstances took the stand as witnesses for the Government and identified the intercepted communications is, we think, an extraordinary basis for the contention that

they thereby sanctioned or authorized the divulging of the communications.

(1) In the first place, their identification of the communications when confronted with the phonographic records was no authorization for the interception and divulging which preceded this confrontation. Yet, the statute requires authorization for both.

(2) In the second place, the identification of these communications in Court by the Government's witnesses, under the circumstances of this case, was in no proper sense an "authorization" to divulge, within the meaning of Section 605. At the very least, the statute must be held to contemplate a real consent, voluntarily given by the sender, to make use of the intercepted communication. It does not contemplate an acquiescence induced by fear of punishment, hope of leniency, and actual cash consideration.

In fact, the Government in this case did precisely what the statute forbade it to do. It tapped the wires and intercepted the communications without pretense of authority. It made records and transcripts of the conversations and divulged them freely during the course of its preparation of the case. Finally, after confronting certain of the participants with these conversations and inducing their admissions as to their identity, it divulged the communications to the Court and jury by introducing them in evidence. If this is "authorization" then the statute is virtually a nullity. All that the Government would need to do would be to tap the wires in plain violation of the statute in the hope that, by some measure or other, the parties to the conversation, after their arrest, might be induced to admit it. If such inducements were of no avail, the results of the interception could still be injected into the record under the guise of cross-examination, as was done in this case upon the cross-

examination of defendant Weiss with respect to conversations not in evidence (R. below 2000, 2003, 1963-9, 1908-25).

(3) Even if identification could be deemed the equivalent of authorization (as it clearly cannot), authorization by only one party to the communication would not constitute the authorization necessary under Section 605. Thirty-seven conversations introduced in evidence were identified by only one of the parties thereto, the other party being one of the petitioners. Thirty-eight conversations were identified by both parties thereto, both of them having testified for the Government (R. 129). The Government's contention is that since one of the parties to certain of the conversations pleaded guilty and testified for the Government he presumably authorized the disclosure of the conversations and that such authorization constitutes consent by the "sender" of the communication within the meaning of Section 605. The answer to such an argument is manifest. Each party to a telephone conversation is the "sender", with respect to his particular portion of the conversation. The statute was designed, as the Circuit Court of Appeals said in the *Diamond* case, to secure the privacy of the instrumentality and the communications passing over it. Its obvious purpose was to protect the communication and to protect each party to a conversation from its interception and disclosure without his consent. To permit such disclosure, solely upon the consent of the other party to the conversation, is in effect to nullify the statute. We think it clear that authorization, in the sense intended by the statute, was completely lacking in the present case.

POINT II.

The evidence derived from intercepted telephone communications was inadmissible because obtained and received in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

In contending that the admission of the intercepted communications violated the Fourth and Fifth Amendments to the Constitution we are frankly asking the Court to reconsider and overrule its decision in *Olmstead* v. *United States*, 277 U. S. 438 (1927), in so far as its force has not already been impaired by the decision in the *Nardone* case (*supra*, 302 U. S. 379). This Court held in the Olmstead case, by a 5 to 4 decision, that the interception of telephone messages by wire-tapping was not an illegal search and seizure, within the meaning of the Fourth Amendment, and that a defendant against whom evidence had been obtained by such means was not compelled to be a witness against himself within the meaning of the Fifth Amendment.

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fifth Amendment provides that "No person * * * shall be compelled in any criminal case to be a witness against himself".

Under the construction adopted by the majority of this Court, in the *Olmstead* case, *supra*, the application of the Fourth Amendment was limited to searches and seizures of physical objects, and it was said that there was no justifi-

cation for enlarging the language "beyond the possible practical meaning of houses, persons, papers, and effects," or so to apply the words "search and seizure as to forbid hearing or sight" (p. 465).

On this basis, for instance, this Court distinguished *Ex parte Jackson*, 96 U. S. 727 (1877), where the Fourth Amendment, "as a principle of protection", was deemed to apply to sealed letters and packages in the mail, so that "the unlawful rifling by a Government agent of a sealed letter is a search and seizure of the sender's papers or effects". By way of distinction, it was asserted that in the case of wire-tapping there is no search and no seizure. With particular reference to the telephone, this Court said (p. 465):

> "By the invention of the telephone, fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched."

and further (p. 466):

> "The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation."

With all due respect, we find it difficult to believe that this should stand as the appropriate language of constitutional interpretation, particularly as applied to the broad principles intended to be served by the bill of rights. Is it a prohibited search and seizure to abstract a message from the paper used to carry a written communication but not from a wire used to carry a spoken message? Is it really the "reasonable view" that the person who installs a telephone in his house "intends to project his voice to those quite outside" and along the "wires beyond his house",—or is it the reasonable view that one who taps a telephone wire on the outside is using a peculiarly offensive method of projecting himself into the house of the person using the telephone? Certainly, the ordinary person, using a telephone in the privacy of his house, does not regard himself as broadcasting his communication for the benefit of all members of the public within reach of the telephone wires.

Urgently as we request this Court to re-consider the *Olmstead* decision, however, we refrain from re-arguing at length the merits of the controversy there presented. It would, we think, be difficult if not impossible to add to the presentation of the opposing view as set forth in the dissenting opinions. (Id., pp. 469-488).

POINT III.

The evidence derived from intercepted telephone communications was inadmissible because obtained in violation of State Statute.

Quite apart from Section 605 of the Federal Communications Act and from the Fourth and Fifth Amendments, it is to be noted that wire-tapping is prohibited by statute in

New York. Section 1423 of the Penal Law (Consolidated Laws, chap. 40) provides that:

"A person who * * *

* * * * *

6. * * * shall unlawfully and wilfully cut, break, tap, or make connection with any telegraphic or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; * * * or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned; * * *

* * * * *

is punishable by imprisonment for not more than two years."

The court below erroneously stated in its opinion (R. 119) that "No law of New York prohibited obtaining messages by wire-tapping". It may be added that the New York Statute above quoted was cited by Mr. Justice Brandeis in his dissenting opinion in the *Olmstead* case in listing the states in which it is a criminal offense to intercept a message sent by telegraph or telephone (277 U. S. 438, 479-480).

In *Olmstead* v. *United States*, *supra*, the court recognized that evidence obtained by wire-tapping in violation of state

statute (Id. p. 468) was evidence procured by the criminal act of agents of the United States. Nevertheless, the majority of the court held that the evidence obtained by such means was admissible under the general common-law rule "that the admissibility of evidence is not affected by the illegality of the means by which it was obtained" (Id., p. 467). With respect to the Washington statute there violated the court said (p. 469): "This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be".

In refusing to recognize any further exception to the general common-law rule, this Court said (Id., p. 468):

> "A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore."

While "nice ethical conduct" in the acquisition of evidence is doubtless too high a standard, there would seem to be forceful reasons for holding that the acquisition of evidence by means of direct violation of valid federal or state statutes should not be tolerated by the Courts. Assuming that the violation of the statute should not be tolerated, it is clear, to adapt the language applied by this Court to the protection of the Fourth Amendment (*supra* p. 18), that the protection of a valid statute would be much impaired unless it was held that not only was the official violator of the statute subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.

While a majority of this Court refused to recognize such an additional or broadened exception to the general common-law rule, the dissenting Justices rendered a vigorous protest.

Mr Justice Holmes said in his dissenting opinion (p. 469-470):

> "But I think, as Mr. Justice Brandeis says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. * * * We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part. * * * If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed" (*Olmstead* v. *United States*, 277 U. S. 438 at pp. 469-70).

Since the decision in the *Olmstead* case, there has been a rising tide of public opinion against wire-tapping by Federal officers, an opinion which this Court has noted (*Nardone* v. *United States*, 302 U. S. 379, 384).

It has been suggested that the *Nardone* decision has overruled *Olmstead* v. *United States*, *supra*, on this point. See dissenting opinion of Judge Morton in *Valli* v. *United States*, 94 F. (2d). 687. While such a reading of the *Nardone* case may involve an extension of the language of the opinion beyond the point actually decided, it may safely be said that this Court in the *Nardone* case has recognized the unethical quality and the practical dangers of wire-tapping and has thus approved a point of view wholly at variance with that of the majority of the Court in the *Olmstead* case, a point of view which must ultimately lead to the elimination of the evils which the practice embodies.

Petitioners urge that the position maintained by the dissenting justices in *Olmstead* v. *United States* should be adopted by this Court and that the *Olmstead* case should be definitely overruled. Wholly apart from the effect of the

Federal Communications Act and the effect of the Fourth and Fifth Amendments, it lies within the power of this Court to lay down common-law rules of evidence for the conduct of criminal trials in the Federal courts. As Mr. Justice Holmes said in the *Olmstead* case:

> "There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules" (*Olmstead* v. *United States*, 277 U. S. 438, 470).

We ask this Court to give effect to the point of view which it recognized in the *Nardone* case and to declare, once and for all, that the crime of Federal officers shall not be tacitly condoned by the Federal courts and that evidence obtained as the fruits of such crime shall not be admissible in a Federal criminal trial.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed because of the admission of concededly prejudicial evidence obtained in violation of Federal and State law and in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

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